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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 WESLEY F. ANDERSON,
8
9 Plaintiff,

10 v.
11 CAROLYN W. COLVIN, Acting
12 Commissioner of Social Security,
13 Defendant.

NO. CV-12-0054-RHW

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

14 Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 14
15 and Defendant's Motion for Summary Judgment, ECF No. 16. The motions were
16 heard without oral argument. Plaintiff is represented by Jeffrey Schwab.
17 Defendant is represented by Assistant United States Attorney Pamela De Rusha
18 and Special Assistant United States Attorney Richard Rodriguez.

19 **I. Jurisdiction**

20 On January 14, 2009, Plaintiff Wesley F. Anderson filed a Title II
21 application for disability insurance benefits (DIB) and a Title XVI application for
22 Supplemental Social Security Income (SSI) on January 28, 2009. Plaintiff alleges
23 that he has been disabled since August 15, 2007.

24 His application was denied initially on April 20, 2009, and again denied on
25 reconsideration on September 23, 2009. A timely request for a hearing was made.
26 On December 15, 2010, Plaintiff appeared in Wenatchee, Washington before
27 Administrative Law Judge (ALJ) Caroline Siderius. Daniel R. McKinney, Sr.,
28 vocational expert, also appeared at the hearing. Plaintiff was represented by

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1 attorney Jeffrey Schwab.

2 The ALJ found that Plaintiff was not disabled since August 15, 2007, the
 3 date the alleged disability began. Plaintiff timely requested review by the Appeals
 4 Council, which was denied on December 15, 2011. The Appeals Council's denial
 5 of review makes the ALJ's decision the final decision of the Commissioner. 42
 6 U.S.C. §405(h). Plaintiff timely filed an appeal with the U.S. District Court for the
 7 Eastern District of Washington on January 20, 2012. The instant matter is before
 8 the district court pursuant to 42 U.S.C. § 405(g).

9 **II. Sequential Evaluation Process**

10 The Social Security Act defines disability as the "inability to engage in any
 11 substantial gainful activity by reason of any medically determinable physical or
 12 mental impairment which can be expected to result in death or which has lasted or
 13 can be expected to last for a continuous period of not less than twelve months."
 14 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
 15 under a disability only if his impairments are of such severity that the claimant is
 16 not only unable to do his previous work, but cannot, considering claimant's age,
 17 education and work experiences, engage in any other substantial gainful work
 18 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential evaluation process
 20 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
 21 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

22 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
 23 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
 24 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
 25 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
 26 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
 27 416.920(b). If he is not, the ALJ proceeds to step two.

28 Step 2: Does the claimant have a medically-severe impairment or

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1 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
 2 claimant does not have a severe impairment or combination of impairments, the
 3 disability claim is denied. A severe impairment is one that lasted or must be
 4 expected to last for at least 12 months and must be proven through objective
 5 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
 6 severe, the evaluation proceeds to the third step.

7 Step 3: Does the claimant's impairment meet or equal one of the listed
 8 impairments acknowledged by the Commissioner to be so severe as to preclude
 9 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
 10 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
 11 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
 12 impairment is not one conclusively presumed to be disabling, the evaluation
 13 proceeds to the fourth step.

14 Step 4: Does the impairment prevent the claimant from performing work he
 15 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
 16 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
 17 perform this work, the ALJ proceeds to the fifth and final step.

18 Step 5: Is the claimant able to perform other work in the national economy
 19 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
 20 416.920(f).

21 The initial burden of proof rests upon the claimant to establish a *prima facie*
 22 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
 23 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
 24 mental impairment prevents him from engaging in his previous occupation. *Id.* At
 25 step five, the burden shifts to the Commissioner to show that the claimant can
 26 perform other substantial gainful activity. *Id.*

27 **III. Standard of Review**

28 The Commissioner's determination will be set aside only when the ALJ's

1 findings are based on legal error or are not supported by substantial evidence in
 2 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
 3 (citing 42 .S.C. § 405(g)). Substantial evidence is “more than a mere scintilla,”
 4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but “less than a preponderance.”
 5 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
 6 evidence is “such relevant evidence as a reasonable mind might accept as adequate
 7 to support a conclusion.” *Richardson*, 402 U.S. at 401. The Court must uphold the
 8 ALJ’s denial of benefits if the evidence is susceptible to more than one rational
 9 interpretation, one of which supports the decision of the administrative law judge.
 10 *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). “If the
 11 evidence can support either outcome, the court may not substitute its judgment for
 12 that of the ALJ.” *Matney*, 981 F.2d at 1019.

13 A decision supported by substantial evidence will be set aside if the proper
 14 legal standards were not applied in weighing the evidence and making the
 15 decision. *Brawner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
 16 Cir. 1988). An ALJ is allowed “inconsequential” errors as long as they are
 17 immaterial to the ultimate non-disability determination. *Stout v. Comm'r, Soc. Sec.*
 18 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

19 **IV. Statement of Facts**

20 The facts have been presented in the administrative transcript and the ALJ’s
 21 decision, and will only be summarized here.

22 At the time of the hearing, Plaintiff was 49 years old. He earned his GED.
 23 He served in the Marine Corps and was honorably discharged. He has four felony
 24 charges and served time in prison, the last time was in 1993. He is single and does
 25 not have any children.

26 He previously worked at a lumber yard for many years. While working, he
 27 hurt his right knee in 1998. Eventually, he had anterior cruciate ligament
 28 reconstruction surgery on the knee. In 2002, Plaintiff hurt his left knee while at

1 work, and eventually had anterior cruciate ligament reconstruction surgery on this
 2 knee. In 2006, he began to experience increasing swelling and pain in his left
 3 knee. As a result, he had a total left knee replacement. His right knee began
 4 showing signs of marked degenerative changes with a complete loss of the joint
 5 space, and as a result, in 2010, he had a total right knee replacement.

6 During the recovery of his knee surgeries, Plaintiff gained over 100 lbs. He
 7 is a chronic smoker and in the past, was a heavy drinker and occasionally used
 8 recreational drugs.

9 He alleges he is not able to work because of the pain in his right knee,
 10 chronic pulmonary disease, obesity and sleep apnea. (Tr. 44.)

11 V. The ALJ's findings

12 The ALJ found Plaintiff met the insured status requirements of the Social
 13 Security Act through December 31, 2011. (Tr. 21.)

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 15 activity since August 15, 2007, the alleged onset date. (Tr. 21.)

16 At step two, the ALJ found Plaintiff had the following severe impairments:
 17 status post bilateral knee surgeries; chronic obstructive pulmonary disease; and
 18 obesity (Tr. 21.)

19 At step three, the ALJ found Plaintiff did not have an impairment or
 20 combination of impairments that meets or medically equals one of the listed
 21 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr. 22.) The ALJ
 22 considered whether Plaintiff met the listing for 1.02, major dysfunction of a joint.
 23 (Tr. 22.)

24 The ALJ found that Plaintiff has the residual functional capacity¹ to perform

25

26 ¹"RFC is what an individual can still do despite his or her functional limitations
 27 and restrictions caused by his or her medically determinable physical or mental
 28 impairments. It is an administrative assessment of the extent to which an

1 less than the full range of light work as defined in 20 C.F.R. §§ 404.1567(b) and
2 416.967(b),² except he can frequently lift and/or carry ten pounds, occasionally lift
3 and/or carry twenty pounds, stand and walk up to four hours a day, changing
4 positions once an hour; cannot kneel, crouch, crawl or stoop, climb ladders, ropes
5 or scaffolds, and avoid concentrated exposure to hazards such as moving
6 machinery and heights, and avoid concentrated exposure to odors, gases, dust, and
7 fumes. (Tr. 23.)

8 At step four, the ALJ found Plaintiff not capable of performing past relevant
9 work as a material handler or construction worker. (Tr. 26.)

10 At step five, the ALJ considered Plaintiff's age, education, work experience,
11 and residual functional capacity and found there are jobs that exist in significant
12

13 individual's medically determinable impairment(s), including any related
14 symptoms, such as pain, may cause physical or mental limitations or restrictions
15 that may affect his or her capacity to perform work-related physical and mental
16 activities. . . RFC is the individual's maximum remaining ability to perform
17 sustained work on a regular and continuing basis: i.e. 8 hours a day, for 5 days a
18 week, or an equivalent work schedule. SSR96-6P.

19 ²(b) Light work. Light work involves lifting no more than 20 pounds at a time
20 with frequent lifting or carrying of objects weighing up to 10 pounds. Even though
21 the weight lifted may be very little, a job is in this category when it requires a
22 good deal of walking or standing, or when it involves sitting most of the time with
23 some pushing and pulling of arm or leg controls. To be considered capable of
24 performing a full or wide range of light work, you must have the ability to do
25 substantially all of these activities. If someone can do light work, we determine
26 that he or she can also do sedentary work, unless there are additional limiting
27 factors such as loss of fine dexterity or inability to sit for long periods of time. 20
28 C.F.R. §§404.1567(b); 416.967(b).

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1 numbers in the national economy that Plaintiff can perform. Specifically, the ALJ
 2 found that Plaintiff can perform the representative jobs of assembly, small
 3 products assembler, and hand packager, packing line worker. (Tr. 27.)

4 VI. Issues for Review

5 Plaintiff presents the following issues with respect to the ALJ's findings:

- 6 1. The ALJ decision is not supported by substantial evidence and she did
 7 not apply the proper legal standard;
- 8 2. The ALJ failed to properly assess Plaintiff's severe impairments; and
- 9 3. The ALJ improperly assessed Plaintiff's residual functional capacity.

10 VII. Discussion

11 1. Plaintiff's Severe Impairments

12 Plaintiff argues the ALJ failed to properly identify his severe impairments.
 13 Plaintiff asserts the ALJ erred in failing to find that his impairments of "severe
 14 dyspnea" or shortness of breath, fatigue, sleep apnea, and cirrhosis are severe.
 15 Plaintiff maintains that fatigue is one of his chief complaints.

16 An impairment or combination of impairments is "severe" within the
 17 meaning of the regulations if it significantly limits an individual's ability to
 18 perform basic work activities. 20 C.F.R. §§ 404.1521, 216.921. An impairment or
 19 combination of impairments is "not severe" when medical and other evidence
 20 establish only a slight abnormality or a combination of slight abnormalities that
 21 would have no more than a minimal effect on an individual's ability to work. *Id.*

22 Plaintiff argues the ALJ erred in failing to identify "severe dyspnea" or
 23 shortness of breath, fatigue, sleep apnea and cirrhosis as severe impairments. In
 24 doing so, Plaintiff cites to Tr. 225, but this record is a March 8, 2007 letter to the
 25 claims manager for the Department of Labor & Industries, and only deals with
 26 Plaintiff's post left total knee replacement. It does not support Plaintiff's
 27 argument.

28 In July, 2008, Plaintiff saw Shellie Rabidou, complaining of fatigue and

1 shortness of breath with activity. Ms. Rabidou noted that Plaintiff was still
2 actively drinking whisky and beer, was a heavy smoker, 1-1/2 packs per day, and
3 used marijuana on occasions. (Tr. 255.) She noted that his fatigue was probably
4 related to his COPD, and possible to sleep apnea. Ms. Rabidou is not an
5 acceptable source and the ALJ cannot rely on her opinion to establish the
6 existence of a medically determinable impairment. 20 C.F.R. 404.1513(a);
7 416.913(a); SSR-06-03p.

8 On February, 2009, Dr. Primm conducted a consultation. He noted that
9 Plaintiff had a host of problems, the most important being morbid obesity,
10 probably severe COPD, probably sleep apnea, chronic cigarette smoking and
11 chronic alcohol abuse. (Tr. 240). Notably, he did not identify fatigue or dyspnea as
12 problems or impairments.

13 At the hearing, Plaintiff complained of fatigue. However, the ALJ
14 concluded that Plaintiff's statements concerning the intensity, persistence and
15 limiting effects of his symptoms are not credible to the extent they are inconsistent
16 with his residual functional capacity. (Tr. 23.) Plaintiff did not challenge this
17 finding. As such, there is nothing in the record to support Plaintiff's assertions that
18 fatigue would prevent him from working an eight-hour workday, forty-hour
19 workweek.

20 The ALJ did not err in failing to identify fatigue as a severe impairment.
21 There was no medical evidence to support this finding. Plaintiff indicated that he
22 can perform a full range of daily activities. He cleans his house, does dishes, plays
23 cards several times a month, watches movies, regularly attends medical
24 appointments, and grocery shops. He lives alone, cares for his dog, and can mow
25 his lawn. Plaintiff testified that he last worked in October, 2008, "under the table"
26 creating cement foundations and decks for mobile homes. (Tr. 42.) This work
27 lasted for two months, and demonstrates that fatigue is not an impairment. Also,
28 the ALJ noted that his lung volumes were within normal limits. (Tr. 22.)

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With respect to sleep apnea, the ALJ relied on the fact that Plaintiff received treatment and reported improvements with the CPAP machine to conclude the impairment was non-severe. This was not in error.

With respect to his diagnosis of cirrhosis, Plaintiff cites to Tr. 240, which is a report of a February 12, 2009 consultive exam by Dr. Primm, a cardiologist. Dr. Primm noted in the past medical history that “[a] a diagnosis of cirrhosis of the liver has been made, although I am not sure what data determined that.” (Tr. 240.) He also cited to Tr. 251, which is a report of a December 31, 2008 visit. There, Shellie Rabidou, MMSc, PA-C, noted that she would be referring Plaintiff “to gastroenterology to make sure there is not anything else that we need to do for his cirrhosis.” (Tr. 251.)

These records do not indicate a diagnosis of cirrhosis. Ms. Rabidou is not an acceptable source and the ALJ cannot rely on her opinion to establish the existence of a medically determinable impairment. 20 C.F.R. 404.1513(a); 416.913(a); SSR-06-03p. Moreover, other records indicate that such a diagnosis has not been made. *See* TR. 244 (“Mr. Anderson certainly has evidence of chronic hepatic dysfunction, though we cannot make a diagnosis of cirrhosis based on the studies to date.”—dated 2/29/2009); Tr. 311 (“At this time he does not have any evidence of cirrhosis. The chronic hepatic dysfunction is due to long term alcohol abuse.”—dated 6/30/2009). The ALJ did not err in concluding that Plaintiff did not have a severe impairment of cirrhosis.

Plaintiff argues in passing that because there was evidence of drug and alcohol abuse, the ALJ should have obtained the opinion of a medical expert to address this issue. A DDA analysis is only required if the ALJ concludes that Plaintiff is disabled. *See Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001) (holding ALJ must identify disability under five-step procedure before conducting DAA Analysis to determine whether substance abuse was material to disability). Also, the claimant bears the burden of proving that drug or alcohol

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1 addiction is not a contributing factor material to his disability. *Parra v. Astrue*,
 2 481 F.3d 742, 747 (9th Cir. 2007).

3 The ALJ has a special duty to fully and fairly develop the record. *Webb v.*
 4 *Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). Where it is necessary to enable the
 5 ALJ to resolve an issue of disability, the duty to develop the record may require
 6 consulting a medical expert. See 20 C.F.R. §§ 404.1519a, 416.919a; *Reed v.*
 7 *Massanari*, 270 F.3d 838, 842 (9th Cir. 2001). Here, the ALJ did not state, nor does
 8 the record reflect, that the medical evidence was ambiguous or that the record was
 9 otherwise inadequate to allow for proper evaluation of Plaintiff's disability. As
 10 such, it was not necessary for the ALJ to consult a medical expert. The ALJ did
 11 not err in obtaining the opinion of a medical expert regarding Plaintiff's DDA
 12 issues or his other medical conditions.

13 **2. Plaintiff's Residual Functional Capacity**

14 Plaintiff argues the ALJ improperly assessed his residual functional capacity
 15 when she determined he was capable of light duty with certain limitations.
 16 Plaintiff argues his treating physicians concluded that he is capable of only
 17 sedentary exertion. Plaintiff stated that Dr. Lamberton, Dr. Berg, and a PAC
 18 opinion that Plaintiff was capable of sedentary exertion, and goes on to argue that
 19 “[n]ever once did any treating physician express exertion capacity in excess of
 20 sedentary.” ECF No. 15 at 7.

21 This is not true. On June 24, 2010, Dr. Lamberton wrote a letter to Ted
 22 Braid, Claims Manager for the Department of Labor and Industries. (Tr. 542.) At
 23 that time, Plaintiff was close to a year status post right total knee replacement. (Tr.
 24 542.) Dr. Lamberton concluded that Plaintiff would not be able to return to his
 25 former job because the job analysis indicated that 75% of the work is labor work
 26 and 25% is supervision. (Tr. 542.) He opined that Plaintiff was not capable of
 27 labor intensive work, but he could lift or carry up to 20 pounds. (Tr. 542.) He
 28 asked the Department of Labor and Industries to retrain Plaintiff to “sedentary to

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1 light work." (Tr. 542.)

2 Then, on July 15, 2010, Dr. Lamberton opined that Plaintiff's condition
 3 with respect to his right knee replacement is "fixed and stable and he is doing
 4 well." (Tr. 538.) He reiterated that Plaintiff cannot return to his former job and he
 5 should limit his lifting and carrying to 20 pounds. (Tr. 538.) Dr. Lamberton again
 6 asked the Department of Labor and Industries to retrain Plaintiff "so that he can
 7 return to work in a more light duty setting." (Tr. 538.).

8 The portions of the record cited by Plaintiff reflect Dr. Lamberton's
 9 opinions during the recovery phase. The following chart provides Plaintiff's
 10 citation to the record and the corresponding time in the recovery phase. It can be
 11 expected that Plaintiff would not be able to perform light duty while he was
 12 recuperating from total knee replacement.

TR	Date	Post-recovery Time Frame - approx.
546	1/14/2010	six month status post right knee replacement
551	11/5/2009	four month status post right knee replacement
552	9/3/2009	sixty-six days status post right knee replacement
581	8/20/2009	forty-five days status post right knee replacement
632	8/13/2009	forty days status post right knee replacement
634	7/30/2009	thirty day status post right knee replacement
668	7/9/2009	ten day status post right knee replacement

20 Plaintiff cites to Tr. 539 and states that Dr. Lamberton opined that Plaintiff
 21 was capable of only sedentary exertion. The Court has reviewed this document and
 22 it cannot find where Dr. Lamberton concluded that Plaintiff could only perform
 23 sedentary exertion. Instead, Dr. Lamberton wrote that Plaintiff was not restricted
 24 from sitting, and could frequently stand/walk (3-6 hours), seldom lift, carry and
 25 push/pull 20 pounds, and occasionally lift 5 lbs. (Tr. 539.), which is reflected in
 26 the ALJ's residual functional capacity.
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28 Plaintiff also cited to Tr. 334, asserting that Dr. Berg opined that he was

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1 capable of only sedentary exertion. Again, there is no specific statement regarding
2 sedentary or light range of duty. Dr. Berg did not fill out the section that would
3 indicate how many hours Plaintiff could sit, stand, walk at one time and during an
4 entire 8 hour day, but he concluded that Plaintiff could seldom lift and carry 11-20
5 lbs, and occasionally carry and lift 6-10 pounds. (Tr. 334.) Notably, this
6 assessment was dated 5/4/2009, which is prior to Plaintiff's total right knee
7 replacement.

8 Plaintiff has not identified any other medical records to support his assertion
9 that the ALJ erred in not assessing a sedentary RFC. On the other hand, the ALJ
10 properly relied on Dr. Lamberton, Dr. Berg, Dr. Platter, and Dr. Staley
11 determinations that Plaintiff could perform light work with certain limitations in
12 determining Plaintiff's residual functional capacity.

13 **VIII. Conclusion**

14 Plaintiff has not met his burden of showing the ALJ committed legal error,
15 or that her conclusion that Plaintiff was not disabled from August 15, 2007 to
16 February 7, 2011, is not supported by substantial evidence. The ALJ properly
17 found that Plaintiff was capable of performing the requirements of representative
18 occupations such as assembly, small products assembler, and hand packager,
19 packing line work.

20 Accordingly, **IT IS HEREBY ORDERED:**

- 21 1. Plaintiff's Motion for Summary Judgment, ECF No. 14, is **DENIED**.
- 22 2. Defendant's Motion for Summary Judgment, ECF No. 16, is

23 **GRANTED.**

- 24 3. The decision of the Commissioner denying benefits is **affirmed**.

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4. The District Court Executive is directed to enter judgment in favor of Defendant and against Plaintiff.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order and provide copies to counsel, and **close the file**.

DATED this 18th day of October, 2013.

s/Robert H. Whaley

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